

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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| DAVID E. PRATER |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 1,050,006 |
| HOSPIRA, INC. |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| FIDELITY & GUARANTY INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier (respondent) request review of the May 3, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ's Order states in part:

This Court finds that the Claimant was injured out of and in the course of his employment with the Respondent through March 10, 2010.

Dr. Pat Do is authorized as the Claimant's treating physician to treat his left wrist injury. Dr. Do is authorized to perform a physical examination of the Claimant's back, knees, shoulders, and to treat any of these injuries he deems work related.¹

Respondent requests review of the preliminary hearing Order alleging, first, that the claimant's back, neck, bilateral shoulder and bilateral knee complaints are not due to workplace injury but are due to his natural aging process. Second, respondent alleges claimant filed his workers compensation claim for those alleged injuries in retaliation for his termination by the respondent. Consequently, respondent requests the Board to reverse

¹ ALJ Order (May 3, 2010). The Order also awarded claimant temporary total disability benefits at a rate of \$546 a week beginning March 6, 2010, until claimant is released or accommodated employment is provided.

ALJ Clark's Order, conclude that claimant did not sustain an accidental injury to his neck, back, shoulders and knees arising out of and in the course of his employment with respondent and deny claimant's claim for those alleged injuries.² Respondent concedes the claimant injured his left wrist on March 5, 2010, while tightening a hose clamp.³

Claimant requests the Board to affirm ALJ Clark's preliminary hearing Order, arguing the Order is reasonable based on claimant's strenuous work duties and claimant's consistent testimony and reports of the injuries to the physicians.

The issues are:

- Whether claimant sustained his burden of proof that he sustained accidental injury arising out of and in the course of his employment with the respondent.
- Whether the ALJ exceeded his jurisdiction by delegating the causation determination to Dr. Do.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant is claiming a specific accidental injury to his left wrist on March 5, 2010, and injuries to his knees, shoulders and low back due to a series of accidents over the course of his employment with respondent through the last day worked, March 9, 2010.

Claimant had worked for respondent, a pharmaceutical company, since 1991.⁴ Claimant worked as a senior production operator on a filling line, performing maintenance on machinery, keeping machinery running and doing setup.⁵ Claimant's job duties required him to lift equipment from a rack after it came through a steam sterilizer, take it into his filling suite and assemble a filling pump with the heaviest part weighing between 82 and 87 pounds once it is assembled. Claimant then would lift and carry the assembled pump three or four steps, lean over the filling machine and set the pump down, and then hook

² At the April 22, 2010 preliminary hearing, respondent admitted claimant sustained a work-related injury to his left wrist. P.H. Trans. at 5, 6.

³ Respondent's Brief at 2 (filed June 3, 2010).

⁴ P.H. Trans. at 9.

⁵ *Id.*, at 10.

up and assemble everything.⁶ During the last six months of claimant's employment, he was required to pull tubing off of a barrel-type apparatus.⁷ Claimant testified this was quite strenuous and he frequently would wait for someone to help him get it off.⁸ Claimant's duties involved lifting, bending and twisting at the waist and squatting on a regular basis to make adjustments to machinery.⁹

On March 5, 2010, claimant was tightening a hose clamp when the screwdriver slipped and he hyperextended his left wrist and felt and heard it pop.¹⁰ Claimant reported the accident to the company nurse.¹¹

On March 9, 2010, claimant was terminated.¹² Claimant's supervisor, Tyler Whorton, testified claimant was terminated because "[i]t was felt that there was a falsification of documentation."¹³ Claimant worked in the M5 area, a multi-dose vial filling line. The work required a syringe be inserted in the vial to pull a certain amount out. The person filling the vials must measure the volume in the vial and register the volumes contained in the vial. After discovering falsified paperwork regarding the amount of medication contained in each vial of medication in January or February 2010, Mr. Whorton conducted an investigation and concluded claimant had modified or falsified the records.¹⁴ Prior to the investigation, Mr. Whorton described claimant as an honest and hardworking employee.¹⁵

⁶ *Id.*, at 10, 11.

⁷ *Id.*, at 11.

⁸ *Id.*

⁹ *Id.*, at 12.

¹⁰ *Id.*, at 15.

¹¹ *Id.*, at 15, 16.

¹² *Id.*, at 16.

¹³ Whorton Depo. at 18.

¹⁴ *Id.*, at 5, 11.

¹⁵ *Id.*, at 19.

Claimant testified he reported his complaints regarding his shoulders, knees and back to Mr. Whorton and to another supervisor, Stan Thiessen.¹⁶ Claimant testified his physical complaints came up in conversations with both Mr. Whorton and Mr. Thiessen when there were personnel leaving the line and claimant would ask to get someone to help him with the filling pump. According to claimant, this occurred two or three times. Mr. Whorton testified as did Mr. Thiessen that the claimant did not report complaints about his shoulders, knees or back.¹⁷

Claimant testified that he sought treatment from his family physician, Dr. Chris Rogers, regarding his left wrist injury. He also testified that he told the physician about his knee, back and shoulder complaints at the time he sought treatment for his wrist.¹⁸

Claimant was examined on April 8, 2010, by Dr. Paul S. Stein at the request of claimant's attorney. Claimant reported a specific injury to the left wrist and multiple areas of pain relating to repetitive and heavy work activity.¹⁹ Dr. Stein recommended an MRI of the left wrist. As to the other complaints, Dr. Stein's report states:

I believe that the remainder of the complaints are primarily related to soft tissue injury but I cannot rule out the possibility of lumbar instability or intra-articular pathology in the shoulders and/or knees. Physical examination is relatively benign. Treatment should be determined only upon objective findings on imaging studies. Treatment should also be limited to relatively noninvasive modalities as it would be important to avoid making Mr. Prater's condition worse as he was able to function adequately at what he describes as a heavy job until recently. I recommend x-rays of lumbar spine and cervical spine with flexion-extension and oblique views. I recommend MRI-Arthrogram of both shoulders and MRI scan of both knees. Final diagnosis and treatment recommendations will depend upon findings.

Temporary work restrictions are limited to the left wrist. I recommend that he avoid vibrating or impacting power tools in the left hand. He should also avoid heavy and repetitive use of the left hand.²⁰

¹⁶ P.H. Trans. at 20.

¹⁷ Whorton Depo. at 7, 8; Thiessen Depo. at 6.

¹⁸ P.H. Trans. at 22, 23. (Dr. Rogers' records are not part of the record.)

¹⁹ *Id.*, Cl. Ex. 1 at 4.

²⁰ *Id.*, Cl. Ex. 1 at 4, 5.

Dr. Chris D. Fevurly examined and evaluated claimant at the request of respondent's attorney on April 16, 2010.²¹ In addition to his left wrist injury, claimant reported low back, bilateral shoulder and bilateral knee pain to Dr. Fevurly. Like Dr. Stein, Dr. Fevurly also recommended an MRI of claimant's left wrist. Based on his examination, Dr. Fevurly diagnosed claimant with (1) mild impingement in the right shoulder, (2) chronic regional low back pain without evidence of radiculopathy, (3) bilateral knee patellofemoral syndrome and probable chondromalacia, and (4) left wrist pain following hyperflexion injury, March 5, 2009 [*sic*], (a) the current physical findings are suggestive of a scapholunate ligament injury versus radial carpal degenerative arthritis versus navicular fracture versus carpal bone fracture.²² With regard to claimant's low back, bilateral shoulder and bilateral knee pain, Dr. Fevurly opined that they had no causal relationship to the March 5, 2010 accident.²³ Furthermore, Dr. Fevurly opined that claimant's low back, shoulder and knee complaints were most likely related to degenerative changes in the related joints resulting from the natural consequences of living and aging.²⁴

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 2009 Supp. 44-551.

In the case at hand, the claimant alleges, first, a work-related injury to his left wrist and, second, injuries to his knees, shoulders and low back due to a series of accidents.

The respondent concedes the left wrist injury was work related. Accordingly, the ALJ's finding that the left wrist injury arose out of and in the course of claimant's employment with respondent is affirmed.

The ALJ's findings regarding the alleged series of accidental injuries to claimant's knees, shoulders and low back are unclear and confusing. On one hand, the ALJ infers the alleged series did arise out of and in the course of employment. But then the preliminary hearing Order authorizes Dr. Do to treat the injuries he deems work related.

²¹ *Id.*, Resp. Ex. 2.

²² *Id.*, Resp. Ex. 2 at 5.

²³ *Id.*

²⁴ *Id.*, Resp. Ex. 2 at 6.

Stated another way, the ALJ is asking Dr. Do to determine causation. The phrase “out of” employment points to the cause or origin of the accident. In other words, to find that an accident arose “out of” employment a causation determination must be made. The inference is that the causation determination as to the series has yet to be made. Hence, an “arising out of” decision has arguably not been made by the ALJ.

The preliminary hearing Order presents another issue as to the ALJ exceeding his jurisdiction. Although the ALJ can request a causation opinion from the physician, it is the ALJ who must then consider that evidence in conjunction with the entire evidentiary record and make the decision whether claimant’s injuries were caused by the work-related accident. The ALJ has the statutory authority and duty to make factual determinations in workers compensation cases. That power is vested by statute in the ALJ and cannot be delegated to the physician. It is impermissible for the ALJ to delegate the statutory duty to determine the issue of causation in a workers compensation case. Consequently, that portion of the ALJ’s Order requesting Dr. Do to make a causation determination constitutes an impermissible delegation of the ALJ’s statutory authority and exceeds the jurisdiction of the ALJ.

For the above-stated reasons, the issue of whether the series of accidents arose out of and in the course of claimant’s employment with respondent is remanded to the ALJ.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.²⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the preliminary hearing Order of ALJ John D. Clark dated May 3, 2010, is affirmed in part and remanded in part. The portion of the Order finding and concluding the left wrist injury arose out of and in the course of employment with the respondent is affirmed. The issue of whether claimant was injured as alleged by a series of accidents arising out of and in the course of claimant’s employment with respondent is remanded to the ALJ for a determination.

IT IS SO ORDERED.

²⁵ K.S.A. 44-534a.

Dated this ____ day of August, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge